MOTION FILED
JUN 4 1981

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

Nos. 80-757, 80-895, 80-936

NEW YORK MERCANTILE EXCHANGE,
Petitioner,

vs.

LEIST,
Respondent;

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

vs.

LEIST,
Respondent;

HEINHOLD COMMODITIES, INC.,
Petitioner,

vs.

LEIST,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

MOTION BY SUNNYSIDE EGGS, INC. ET AL. FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Sunnyside Eggs, Inc., *et al.*[1] hereby respectfully move pursuant to Supreme Court Rule 36 for leave to file a brief amicus curiae in these cases. Consent of the petitioners and respondent to file this brief was requested but refused.

Sunnyside and the other amici curiae (collectively "Sunnyside") are egg producers located in the southeastern United States. They are plaintiffs in the suit styled *Sunnyside Eggs, Inc. v. Urner Barry Publications, Inc.*, Civil Action File No. C78-1661A, which is presently pending in the United States District Court for the Northern District of Georgia. Sunnyside's suit alleges that Urner Barry, an organization which issues and distributes quotations for a number of commodities, has damaged Sunnyside's business by manipulating the "cash" or "spot" market for table grade eggs in violation of § 9(b) of the Commodity Exchange Act ("CEA").

The interest of Sunnyside here is to present to the Court the position of producers of agricultural commodities who are damaged by manipulation of the cash markets in which they sell their products. Sunnyside maintains that a private right of action should be implied in § 9(b) of the CEA insofar as manipulation of *cash* markets is concerned. Since the Court has agreed to decide the question of whether an im-

[1] The other entities which join in this motion seeking leave to file an amicus curiae brief are Clarendon Poultry Farms, Inc.; Colonial Egg Processors, Inc.; Elrod Food Products, Inc.; Galloway Egg Farms, Inc.; Green Meadow Farms, Inc.; Kuder Citrus Feed Company, Inc.; Southern Egg Corporation and Springdale Eggs, Inc.

plied private right of action should be found in numerous sections of the CEA, including § 9(b), with respect to manipulation of commodities *futures* markets, resolution of that issue by the Court could have a direct impact on Sunnyside and others who have been victimized by manipulation of cash markets.[2]

Unlike the futures market, however, the reparations provisions contained in 7 U.S.C. § 18 (1976) are generally unavailable against manipulators of cash markets. Thus, if no implied private right of action were found in § 9(b) with respect to cash markets, manipulation of these markets will effectively go unchallenged under the CEA. This result would be contrary to the intent of Congress and is against public policy.

In view of the issues and ramifications of the *Leist* cases with respect to cash markets, which are broader in scope than the direct interests of the parties thereto, Sunnyside respectfully requests that it be permitted to file an amicus curiae brief in these cases so that the views of Sunnyside and those similarly situated may

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[2] The plaintiff in *Incomco v. New York Mercantile Exchange*, one of the cases consolidated herein, sued in part for injuries it suffered as a cash trader of potatoes. Incomco was not, however, a producer of potatoes seeking to hedge its risks, but rather a speculator in the cash market. *Leist v. Simplot*, 638 F.2d 283, 291-3 (2d Cir. 1980). Moreover, Incomco's cash market injury resulted from the defendants' manipulation of the futures market for potatoes. In contrast, there is not even a hint of manipulation of any futures market in Sunnyside's action. Thus, the issue of whether deliberate manipulation of a cash market is enforceable through a private right of action implied in the CEA is not squarely before the Court in the cases it has agreed to hear.

be more adequately presented. The brief Sunnyside seeks leave to file accompanies this motion.

Respectfully submitted,

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**BRIEF OF SUNNYSIDE EGGS, INC. ET AL.
AS AMICI CURIAE IN SUPPORT
OF RESPONDENT**

INTEREST OF THE AMICI CURIAE

These amici (collectively "Sunnyside") are nine egg producers located in the Southeastern United States.[1] In September, 1978, Sunnyside filed suit in the United States District Court for the Northern District of Georgia, Atlanta Division,[2] against Urner Barry Publications, Inc. ("Urner Barry"), a market reporter which issues a daily price quotation for the "spot" or "cash" market for table grade eggs. The first count of Sunnyside's complaint alleged that Urner Barry has damaged Sunnyside's business by manipulation of the price of eggs in interstate commerce through the dissemination of misleading or knowingly inaccurate reports concerning the cash market for eggs in violation of 7 U.S.C. § 13(b) (1976) [§ 9(b) of the Commodity Exchange Act (the "CEA")].[3]

The District Court dismissed that portion of Sunnyside's complaint which was based on § 9(b) of the CEA, ruling there was no private right of action implied in that statute. A copy of the District Court's

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[1] The amici are Sunnyside Eggs, Inc.; Clarendon Poultry Farms, Inc.; Colonial Egg Processors, Inc.; Elrod Food Products, Inc.; Galloway Egg Farms, Inc.; Green Meadow Farms, Inc.; Kuder Citrus Feed Company, Inc.; Southern Egg Corporation; and Springdale Eggs, Inc.

[2] Civil Action File No. C78-1661A.

[3] Between 80 and 90% of the table grade shell eggs sold in the United States east of the Rocky Mountains are traded in relationship to quotations issued by Urner Barry. Sunnyside's complaint also alleges that Urner Barry has monopolized or attempted to monopolize the market for egg price reporting services and that Urner Barry has misrepresented the market value of eggs in violation of common law tort principles.

opinion and order is attached as Exhibit A. The District Court is presently reconsidering its decision pending this Court's rulings in these cases. Copies of the orders holding the District Court's earlier decision in abeyance are attached as Exhibits B and C.

Sunnyside's interest in the cases before this Court is obvious: Any ruling by this Court could be dispositive of Sunnyside's claims under § 9(b) of the CEA. However, the litigation before the Court has significant distinctions from Sunnyside's suit. The cases this Court has agreed to hear involve the alleged manipulation of a commodity futures market;[4] Sunnyside's suit, on the other hand, concerns manipulation of the *cash* or *spot* market for a commodity.[5]

The anti-manipulation and anti-fraud provisions of § 9(b) apply to both futures markets and cash markets. The Commodity Futures Trading Commission

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[4] Petitioners in *Leist* are futures commission merchants and other traders in potato futures contracts. Respondents are holders of "long" positions in potato futures. *National Super Spuds, Inc. v. New York Mercantile Exchange*, 470 F.Supp. 1256, 1258 (S.D.N.Y. 1979).

[5] The plaintiff in *Incomco v. New York Mercantile Exchange*, one of the cases consolidated herein, sued in part for injuries it suffered as a cash trader of potatoes. Incomco was not, however, a producer of potatoes seeking to hedge its risks, but rather a speculator in the cash market. *Leist v. Simplot*, 638 F.2d 283, 291-3 (2d Cir. 1980). Moreover, Incomco's cash market injury resulted from the defendants' manipulation of the futures market for potatoes. In contrast, there is not even a hint of manipulation of any futures market in Sunnyside's action. Thus, the issue of whether deliberate manipulation of a cash market is enforceable through a private right of action implied in the CEA is not squarely before the Court in the cases it has agreed to hear.

("CFTC") actively regulates only futures markets, however, and not cash markets, and the unavailability of an administrative remedy has previously been viewed by this Court as one factor weighing in favor of finding a Congressional intent to imply a private right of action. *Cannon v. University of Chicago*, 441 U.S. 677, 707 n. 41 (1979).

Sunnyside is concerned that if this Court were to rule that there is no implied private right of action under any provision of the CEA, cash market traders like Sunnyside would be left without either a judicial or an administrative forum for redress of manipulation of cash markets proscribed by § 9(b) of the CEA. Sunnyside therefore files this brief to insure that the Court is aware of the separate and distinct interests of those damaged by manipulation of cash markets. Sunnyside urges that the Court expressly reserve decision as to whether there is an implied private right of action in the CEA for manipulation of *cash* markets — an issue not presented in the cases the Court has agreed to hear.

SUMMARY OF ARGUMENT

Certain provisions of the CEA clearly extend to both futures markets and cash markets, *e.g.* § 9(b), 6(c) [now 7 U.S.C. § 13b (1976)], and § 13 [now 7 U.S.C. § 13c (1976)]. The CFTC's administrative expertise and enforcement mechanisms are, however, directed almost exclusively toward regulation of commodity futures transactions, not to regulation or supervision of cash markets. Thus, the existence of the CFTC's reparations procedures as a parallel avenue for meaning-

ful redress — a consideration that tends to mitigate against implication of a private right of action in the CEA — is not available to Sunnyside or others who are victims of cash market manipulation that violates § 9(b). This, coupled with the fact that there is no administrative agency which enforces the anti-manipulation provisions of § 9(b) in cash markets, would leave manipulators of cash markets undeterred by the threat of effective enforcement, public or private, of the CEA unless a private right of action is implied in § 9(b) with respect to manipulation of cash markets.

ARGUMENT

I. The Commodity Exchange Act Applies to Cash markets as Well as to Futures Markets.

Section 9(b) of the CEA provides that, it is unlawful:

> . . . [F]or any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, . . . or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce.[6]

[6] This language was contained in the CEA when it was originally enacted in 1936. Despite ministerial amendments altering the penalties in this statute in 1968, 1974 and 1978, it has remained otherwise unchanged since its enactment.

Thus, it is clear that § 9(b) prohibits not only manipulation of commodity futures markets but also manipulation of commodity cash markets, and it is for manipulation of a cash market that Sunnyside has sued Urner Barry.[7]

II. The Reparations Procedures Contained in 7 U.S.C. § 18 (Supp. III 1979) Are Not Available to Sunnyside.

The 1974 amendments to the CEA created within the CFTC a procedure through which "any person complaining of any violation of any provision" of the CEA by a futures commission merchant, floor broker, commodity trading advisor or commodity pool operator[8] might apply to the CFTC for relief.[9] 7 U.S.C. § 18(a)

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[7] Manipulation of the cash market for eggs has occurred previously. *See United Egg Producers v. Bauer International Corp.*, 311 F.Supp. 1375 (S.D.N.Y. 1970). Relief from the manipulative practices in *United Egg Producers* was obtained under §9(b) of the CEA.

[8] These terms are defined in 7 U.S.C. §2 (Supp. III 1979).

[9] 7 U.S.C. §18(a) (Supp. III 1979) provides in full:

> Any person complaining of any violation of any provision of this chapter or any rule, regulation, or order thereunder by any person who is registered or required to be registered under section 6d, 6e, 6j, or 6m of this title may, at any time within two years after the cause of action accrues, apply to the Commission by petition, which shall briefly state the facts, whereupon, if, in the opinion of the Commission, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Commission to the respondent, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be prescribed by the Commission.

(Supp. III 1979). Persons who are not futures commission merchants, floor brokers, commodity trading advisors or commodity pool operators are not subject to these "reparations" procedures. Accordingly, manipulation of a cash market or dissemination of false information by a person who does not fall within one of these four categories is not subject to administrative review, and compensation for damages suffered from illegal conduct by such persons may not be obtained through the CFTC.[10] CFTC personnel have informed counsel for Sunnyside that there has never been a reparations action filed for manipulation of any cash market.

III. The CFTC Has Not Actively or Effectively Regulated Cash Markets.

A. *The CFTC may lack regulatory authority over cash markets.*

The CFTC, as its name states, regulates trading in commodities *futures*. The CFTC is granted exclusive administrative jurisdiction over "accounts, agreements . . . and transactions involving *contracts of sale of a commodity for future delivery* . . . ." 7 U.S.C. § 2 (Supp. III 1979). (Emphasis added.) The term "future delivery" is later defined in 7 U.S.C. § 2 (Supp. III 1979) as "*not* includ[ing] any sale of any cash commodity for deferred shipment or delivery." (Emphasis added).

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[10] Urner Barry registered as a commodity trading advisor approximately 14 months after Sunnyside's suit was filed. Urner Barry's status as a commodity trading advisor is disputed by Sunnyside and has never been ruled on by the District Court.

Moreover, regulation of cash commodity transactions by the CFTC was most likely never intended by Congress. As one commentator has stated: "With respect to grains, and later other commodities, the draftsmen [of the various commodities laws] knew that federal regulation or taxation of cash forward contracts was inappropriate and unintended." Clark, *Genealogy and Benefits of "Contract of Sale of a Commodity for Future Delivery" in the Commodity Exchange Act*, 27 *Emory L.J.* 1175, 1190 (1978).

The legislative history of the 1974 and 1978 amendments to the CEA also indicates that the CFTC may not have the authority to regulate cash markets. *See*, 120 CONG. REC. 10261-62 (1974) and *Hearings Before the House Subcom. on Conservation and Credit of the Comm. on Agriculture*, 95th Cong., 2d Sess. 63 (1978).

B. *Even if the CFTC has the authority to regulate cash markets, it has not exercised that authority and does not have the resources to exercise it.*

Even if the CFTC has some regulatory auspices over cash markets, scrutiny of cash markets has never been given prominence in the CFTC's enforcement scheme. Alex C. Caldwell, Administrator of the Commodity Exchange Authority, testified in 1974 as follows:

> Mr. Rainbolt. Item 8 deals with the problem of investigation by the Commodity Exchange Authority [the predecessor of the CFTC] of cash market manipulations. You are asking for authority to eliminate that requirement as a burden on the CEA. What

> sort of program do you presently have in effect for investigating these transactions?
>
> Mr. Caldwell. Not very much of a program, Mr. Rainbolt. There are thousands and thousands of cash markets around the country where price manipulation could occur. We are not staffed to handle that type of investigation and I do not really believe that Congress actually intended for us to get into this. Our role is really in futures trading and cash markets to the extent that they are connected with such futures trading.

Colloquy between John Rainbolt,[11] Associate Counsel to the Committee, and Alex C. Caldwell, *Hearings Before the House Comm. on Agriculture*, 93rd Cong., 1st Sess. 30 (1973).

The CFTC's Advisory Committee on Definition and Regulation of Market Instruments subsequently recommended that the CFTC's only role in cash markets be that of monitoring cash markets for manipulation that affects futures markets and that the CFTC "should not commit itself to the massive and largely uncontrollable expense of continuous monitoring of any cash market." Recommended Policies on the Cash Market Regulatory Authority and Cash Market Data Needs of the Commodity Futures Trading Commission, Report of the Advisory Committee on Definitions and Regulation of Market Instruments. *Comm. Fut. L. Rep.* (CCH) ¶ 20,225 (10/18/76).

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[11] Mr. Rainbolt was subsequently named Vice Chairman of the CFTC.

In point of fact, therefore, the CFTC has no history of regulating cash markets, no desire to regulate those markets (except, perhaps, to the extent that they affect futures markets) and no resources to regulate those markets. Such a "back-burner" approach to regulation of cash markets is strong evidence of the need for an implied private right of action to control manipulators of these markets.

IV. Implication of a Private Right of Action, at Least with Respect to Cash Markets, is Consistent With the "Underlying Purposes of the Legislative Scheme."

In *Cort v. Ash*, 422 U.S. 66, 78 (1975), this Court listed four factors as indicating whether an implied private right of action should be found in any statute. Those factors were whether (i) the plaintiff was a member of the class for whose especial benefit the statute was enacted, (ii) the legislature intended to imply a private right of action, (iii) an implied private right of action would be consistent with the underlying purposes of the legislative scheme and (iv) the cause of action was one traditionally relegated to state law so that it would be inappropriate to imply a cause of action under federal law. Subsequent opinions by this Court make it clear that the central inquiry is whether the legislature intended to imply a private right of action and that the other *Cort v. Ash* factors are useful primarily as a means for determining legislative intent. *See, e.g., Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979).

The fact that administrative reparations are avail-

able against only certain classes of persons who violate the CEA indicates that it would not interfere with the underlying purpose of the legislative scheme — the third *Cort v. Ash* factor — to imply a private right of action in the CEA. This is especially true in those instances where reparations procedures are unavailable to the plaintiff, because the defendant is not a member of one of the limited groups of persons against whom reparations actions can be maintained. Indeed, Congress' willingness to extend the CFTC's reparations procedures only to actions against certain classes of persons demonstrates that Congress never intended reparations to be the only means of pursuing violations of the CEA.

CONCLUSION

Sunnyside requests that the Court (i) decide only the precise issue before it, *i.e.*, whether a private right of action is implied in the CEA against persons who are clearly subject to regulation by the CFTC and against whom reparations pursuant to 7 U.S.C. § 18 (Supp. III 1979) are clearly available, and (ii) withhold decision as to whether a private right of action should be implied in the CEA under other circumstances.

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Amici Curiae

June 2, 1981

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

SUNNYSIDE EGGS, INC., *et al.*,	:	CIVIL ACTION FILE
Plaintiff,	:	NO. C78-1661A
vs.	:	
URNER BARRY PUBLICATIONS, INC.	:	
Defendant.	:	

ORDER OF COURT

Plaintiffs produce and process eggs and sell them in interstate commerce. Urner Barry publishes price quotations for eggs through a printed publication and by telephone, both forms of communications being disseminated in interstate commerce. In Count I of their complaint, plaintiffs allege that Urner Barry has violated Commodity Act § 9(b), 7 U.S.C. § 13(b), by

> (a) Delivering for transmission and transmitting, through the mails and other means of interstate communication, false, misleading and knowingly inaccurate price quotations for eggs, which quotations affect or tend to affect the prices at which eggs are sold by Plaintiffs and others in interstate commerce; and (b) Attempting to manipulate and manipulating the prices of eggs sold by Plaintiffs and others in interstate commerce.

Complaint ¶ 14(a)-(b). In Count II, plaintiffs allege that Urner Barry has attempted to monopolize and has monopolized the market for its services in violation of Sherman Act § 2, 15 U.S.C. § 2. Specifically, Urner Barry allegedly has no competitor in the reporting of egg prices in the geographic area east of the Rocky Mountains and has been engaged, is now engaged, and will engage in the following practices:

> (a) Utilizing the false, misleading and inaccurate Urner Barry Quote as a means and mechanism of unlawfully attempting to acquire, acquiring and maintaining a monopoly in the market for reporting services for egg price quotations;
>
> (b) Manipulating the Urner Barry Quote to foreclose or prevent effective competition from alternative egg price reporting mechanisms; and
>
> (c) Reserving exclusive rights to the Urner Barry Quote and demanding exclusive rights to or control over the dissemination of prices or quotations from proposed alternative egg price reporting mechanisms.

Complaint ¶ 18(a)-(c). Count III alleges fraudulent, reckless, or negligent misrepresentation. Defendant has counterclaimed under Sherman Act § 1, 15 U.S.C. § 1, alleging that plaintiffs and others have conspired to fix prices, to force defendant to join their alleged conspiracy, and to file this lawsuit in pursuit of their alleged conspiracy.

Urner Barry's Motion to Dismiss

Urner Barry seeks dismissal of Count I of plain-

tiffs' complaint on the ground that there is no implied private cause of action under 7 U.S.C. § 13(b). Defendant further contends that the other two counts should be dismissed because they fall within the primary jurisdiction of the Commodities Futures Trading Commission (CFTC).[1] For the reasons given below, the Court GRANTS the motion only with respect to Count I.

I. *Overview of Commodity Exchange Act (CEA)*

Government regulation of commodities and of commodities futures has a much older history than one might expect. Beginning in 1844 Congress rejected numerous bills which, if enacted into law, would have prohibited futures trading in commodities. By the early 1920's Congressional sentiment had turned from prohibition to regulation, and in 1922 the Grain Futures Act was enacted. Act of Sept. 21, 1922, c.369, 42 Stat. 998.

> The Grain Futures Act of 1922 was designed mainly to enable the Government to deal with the exchanges themselves, rather than with individual traders. To conduct futures trading lawfully, the grain exchanges were required to be federally licensed or "designated" as "contract markets." A condition of such designation was that the exchanges themselves would take major responsibility for the prevention of price manipulation by their members. If they failed to do so, the only recourse was the

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[1] It is not entirely clear, but defendant apparently offers this argument as an alternative ground for dismissal of Count I.

suspension or revocation of their designations, and this was scarcely advisable. Although the legislation did provide for legal action by the Government against price manipulation, some of the legal actions undertaken against alleged manipulators proved ineffectual because of limitations and loopholes in the early law. The Act of 1922 did, however, provide the means for effective and continuous fact-finding and investigations by the U.S. Department of Agriculture which pointed to the sources and patterns of excessive speculation and price manipulation, and clearly showed that the limited regulatory powers authorized were inadequate in dealing with these and other market abuses. Beginning in 1927, the Department began submitting recommendations to Congress for additional legislation, and these eventually resulted, after extensive congressional hearings in the 1934-36 period, in the amended legislation of the latter year.

Under these amendments of 1936, the legislation was renamed the Commodity Exchange Act and the regulatory coverage was extended to cotton and other specified commodities as well as grains. Broad additional authority was granted to deal with market abuses by traders generally as well as exchange members, to prosecute price manipulation as a criminal offense, to curb excessive speculation by the large market operator, and to extend regulation to the previously uncovered field of commodity brokerage in order to suppress cheating, fraud, and fictitious transactions in futures which were seriously impairing the services of the market.

Sen. Rep. No. 95-850, 95th Cong., 2d Sess. (1978), *re-*

printed in [1978] *U.S. Code Cong. & Ad. News*, 2087, 2095-96; *Sen. Rep. No.* 93-1131, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] *U.S. Code Cong. & Ad. News* 5843, 5855.

The focus of the 1974 amendment to the CEA was the creation of the CFTC. The CFTC was given authority to bring injunctive actions in the district courts when it appears to the CFTC that any person is violating "any provision" of the CEA. 7 U.S.C. § 13a-1. Congress also created an administrative reparations procedure for the violations of the CEA by any person registered or required to be registered under 7 U.S.C. § 6. 7 U.S.C. § 18. Persons required to be registered include futures commission merchants (§ 6d and j), floor brokers (§ 6e and j), and commodity trading advisers and commodity pool operators (§ 6m). The 1978 amendment permits states to sue in federal court "to obtain damages... or... other relief...." 7 U.S.C. § 13a-2(1).

Another administrative procedure has been available since 1922. Under 7 U.S.C. § 9 the CFTC may proceed administratively against anyone who "is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity..." and order that person to cease trading on exchanges. The CFTC may also suspend a violator's registration and exact a civil fine of up to $100,000; review of a CFTC order under section 9 may be obtained in a United States Court of Appeals. 7 U.S.C. § 9.

The statute sued under here, 7 U.S.C. § 13(b), has existed in its present form without major change since

1922; it provides:

> It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity, or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, or knowingly to violate the provisions of section 6, 6b, 6c(b) through 6c(e), 6h, 6o(1), or 23 of this title, or knowingly to make any false or misleading statement of a material fact in any registration application or report filed with the Commission, or knowingly to omit in any application or report any material fact that is required to be stated therein. Notwithstanding the foregoing, in the case of any violation described in the foregoing sentence by a person who is an individual, the fine shall not be more than $100,000, together with the costs of prosecution.

II. Implied Cause of Action Under 7 U.S.C. § 13(b)

The question of whether 7 U.S.C. § 13(b) creates an implied cause of action is a threshold question which is significantly different from such other threshold

questions as standing and subject matter jurisdiction.

> Thus it may be said that *jurisdiction* is a question of whether a federal court has the power, under the constitution or laws of the United States, to hear a case; *standing* is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal court jurisdiction; *cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court. . . .

Davis v. Passman, _____ U.S. _____, 99 S.Ct. 2264, 2274 n. 18 (1979) (emphasis in original). *See also, e.g., Chipser v. Kohlmeyer & Co.*, 600 F.2d 1061, 1067 (5th Cir. 1979); *Wilson v. First Houston Invt. Corp.*, 566 F.2d 1235, 1237 n. 2 (5th Cir. 1978), *vac'd on other grounds*, _____ U.S. _____, 100 S.Ct. 442 (1979), *remanded*, slip op. No. 75-3422 (5th Cir. Feb. 21, 1980); *Alkan v. Rosenthal & Co.*, 2 Comm. Fut. L. Rep. (CCH) ¶ 20,797 at p. 23, 252 (S.D. Ohio Feb. 28, 1979). Thus with respect to this issue, the motion of Urner Barry should be construed as a motion to dismiss for failure to state a claim.

A. *Pre-1974 and Post-1975*

Prior to 1974 or 1975 there was little question that the CEA gave rise to an implied private cause of action. At least two courts even so construed 7 U.S.C. § 13(b), the section at issue here. *Deaktor v. C. D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *rev'd on other grounds sub nom. Chicago Merc. Exch. v. Deak-*

tor, 414 U.S. 113 (1973); *United Egg Prod'rs. v. Bauer Int'l Corp.*, 311 F. Supp. 1375 (S.D.N.Y. 1975). At that time the reigning Supreme Court authority on implied causes of action was *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964). In *Borak* the court held that Securities Exchange Act § 14(a), 15 U.S.C. § 78n(a), provides a private cause of action for a shareholder damaged by a false and misleading proxy statement. The Court reasoned that the presence of a broad jurisdictional statute within the Securities Exchange Act — § 27, 15 U.S.C. § 78aa — and the "duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose" required the implication of a private cause of action. *Id.* at 430-33. More recent events require the reexamination of whether there is an implied cause of action under 7 U.S.C. § 13(b).

First, Congress amended the CEA in 1974 and 1978, broadly expanding the number and scope of remedies available as described *supra* pp. 3-4. Second, the Supreme Court, beginning in 1975 in *Cort v. Ash*, 422 U.S. 66 (1975), and culminating in several very recent cases, has become much more reluctant to imply a private cause of action from a statute. In *Cannon v. University of Chicago*, _____ U.S. _____, 99 S. Ct. 1946, 1958 (1979), Justice Stevens wrote that "It was *after* 1972 that this Court decided *Cort* and the other cases cited by the Court of Appeals in support of its strict construction of the remedial aspect of the statute. We, of course, adhere to the strict approach. . . ." (Emphasis added.) Less than a month later, Justice Rehnquist observed that "The invocation of the 'remedial purposes' of the . . . Act is . . . unavailing. . . . To the

extent our analysis in today's decision differs from that of the Court in *Borak*, it suffices to say that in a series of cases since *Borak* we have adhered to a stricter standard for the implication of private causes of action, and we follow that stricter standard today." *Touche Ross & Co. v. Reddington*, _____ U.S. _____, 99 S.Ct. 2479, 2490 (1979), *citing Cannon*, _____ U.S. at _____, 99 S.Ct. at 1958.

B. *Cort v. Ash Factors*

In *Cort* the Supreme Court was asked to imply a private cause of action for damages from 18 U.S.C. § 610, providing in part:

> It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office. . . .

Rejecting the contention that the statute gives rise to an implied private cause of action, Justice Brennan described a pattern of inquiries which a court must make in determining whether a private cause of action may be implied.

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted" — that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the

> legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S. at 78 (citations omitted). Recent cases, decided after the 1974 amendments to the CEA and the Supreme Court's opinion in *Cort*, have split over whether the CEA gives rise to an implied private cause of action.[2] Only *Liang v. Nelson Bunker Hunt* concerns 7 U.S.C. § 13(b); there Judge Decker of the Northern District of Illinois held that there is no implied private cause of action under section 13(b).

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[2] The following cases have found an implied cause of action under the CEA: *Smith v. Groover*, 468 F. Supp. 105 (N.D. Ill. 1979); *Jones v. B. C. Christopher & Co.*, 466 F. Supp. 213 (D. Kan. 1979); *R. J. Hereley & Sons v. Stotler & Co.*, 466 F. Supp. 395 (N.D. Ill. 1979); *Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc.*, 465 F. Supp. 585 (M.D. La. 1979); *Gravois v. Fairchild*, 2 Comm. Fut. L. Rep. (CCH) ¶ 20,706 (E.D. La. 1978); *Hofmayer v. Dean Witter & Co.*, 459 F. Supp. 733 (N.D. Calif. 1978); *Berenson v. Madda Trdg. Co.*, 2 Comm. Fut. L. Rep. (CCH) § 22,796 (D.D.C. 1978); *Kelley v. Carr*, 442 F. Supp. 346 (N.D. Mich. 1977). Cases reaching the opposite conclusion include: *Fischer v. Rosenthal & Co.*, No. 3-77-0824-H (N.D. Tex. December 11, 1979); *National Super Spuds, Inc. v. New York Mercantile Exch.*, 470 F.Supp. 1256 (S.D.N.Y. 1979); *Liang v. Nelson Bunker Hunt*, 2 Comm. Fut. L. Rep. (CCH) ¶ 20,800 (N.D. Ill. 1979); *Alkan v. Rosenthal & Co.*, 2 Comm. Fut. L. Rep. (CCH) ¶ 20,797 (S.D. Ohio 1979); *Berman v. Bache, Halsey, Stuart, Shields, Inc.*, 467 F. Supp. 311 (S.D. Ohio 1979). The Fifth Circuit has twice left the question open. *Chipser*, 600 F.2d at 1067 (5th Cir. 1979); *Moody v. Bache & Co.*, 570 F.2d 523, 529 (5th Cir. 1978).

1. *Class for whose especial benefit statute was enacted*

It is essential to begin this analysis by looking to the language of the statute itself. *Transamerica Mtg. Advisors v. Lewis*, _____ U.S. _____, 100 S.Ct. 242, 245 (1979); *Touche Ross*, _____ U.S. at _____, 99 S.Ct. at 2485; *Cannon*, _____ U.S. at _____, 99 S.Ct. at 1953; *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 24 (1977). Although 7 U.S.C. § 13(b) is not the sort of statute which embodies no rights or prohibitions in favor of anyone,[3] it is unclear from the language of statute itself who should be deemed to benefit from the statute. While it may not be significant that there is no *expressly* named beneficiary,[4] it is significant that 7 U.S.C. § 13(b) is a criminal statute. In both *Cort* and *Chrysler Corp. v. Brown*, _____ U.S. _____, 99 S.Ct. 1705, 1725 n. 46, the Supreme Court distinguished earlier cases in which private causes of action had been implied from criminal statutes. *Citing Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967); *Borak, supra; Texas & Pac. R. Co. v. Rigsby*, 241 U.S.

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[3] *Compare Touch Ross*, _____ U.S. at _____, 99 S.Ct. at 2485, construing Securities Exchange Act § 17(a), 15 U.S.C. § 78q.

[4] In *Cannon*, _____ *U.S. at* _____, 99 S.Ct. at 1954, the Court compared the statute it was then construing — "which expressly identifies the class Congress intended to benefit" — with criminal statutes. Apparently, however, the Court did not intend to rewrite the first *Cort* factor to require an "*express*" designation, because the "*express*" language did not appear as a requirement in *Touche Ross, supra*, or *Transamerica, supra.*

33 (1916). *Wyandotte* involved the significantly different issue of whether the United States had an implied civil cause of action where it concededly had not only a criminal remedy but an *in rem* civil action as well. *Cort*, 422 U.S. at 79 n. 11. In *Rigsby*, the Court found language in the statute under consideration "pertinent only to a private right of action for damages . . . thus rendering '[t]he inference of a private right of action . . . irresistable.'" *Cort*, 422 at 80 n. 11, *citing Rigsby*, 241 U.S. at 40. *Borak*, of course, has been expressly repudiated by the Supreme Court. *See* p. 6, *supra*.[5]

While the Supreme Court seems to have left open the possibility that some criminal statutes may create rights in favor of some specific class, this Court believes that 7 U.S.C. § 13(b) is not such a statute. Plaintiffs maintain that the statute creates rights for the benefit of producers and processors such as themselves, citing several cases including *Liang*, *supra*. In *Liang* the district court noted that the antispeculation provision in 7 U.S.C. § 6(a)(1) was designed to protect producers *and* consumers, 2 Comm. Fut. L. Rep. at p. , and then went on to state that "the price manipulation provision [in 7 U.S.C. § 13(b)] is a general criminal statute for the benefit of the public at large." *Id.* at p. . While one can find isolated statements in cases and in the legislative history referring to this group or that group as the intended beneficiary of 7 U.S.C. § 13(b), this Court agrees with the view expressed in *Liang* that the statute is designed to benefit

[5] Both *Borak*, 377 U.S. at 431-33, and *Rigsby*, 241 U.S. at 39-40, relied to some extent on the now outmoded notion that where there is a right there is a remedy.

the public at large. This view is supported by the emphasis in the legislative history on the far-reaching shock effects in the nation's economy of any effect on the price of commodities. *See e.g., Sen. Rep.* No. 95-850, *supra*, 1978 *U.S. Code Cong. & Ad. News* at pp. 2093-2105.

2. *Legislative intent*

The two most recent Supreme Court cases dealing with implied private causes of action have significantly explained the four-step analysis originally established in *Cort*, emphasizing that the "central inquiry" is legislative intent. *Transamerica*, _____ U.S. at _____, _____, 100 S.Ct. at 245, 249; *Touche Ross*, _____ U.S. at _____, _____, 99 S.Ct. at 2485, 2489. While the legislative intent behind 7 U.S.C. § 13(b) is by no means clear and conclusive, it most likely indicates a lack of intent to create a private remedy. As the *Liang* court observed, this second factor takes on great significance where, as here, "the Court has determined that plaintiffs are not members of a class for whose especial benefit the statute was enacted. . . ." 2 Comm. Fut. L. Rep. at p , *citing Cort*, 422 U.S. at 82-83.

Plaintiffs rely to a great extent on the alleged Congressional recognition and adoption of existing case law holding that the CEA gives rise to an implied cause of action. In *Cannon* the Court found an implied private cause of action under Section 901(a) of Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681, citing as its first reason that when Title IX was enacted in 1972, Congress was presumably aware that the courts had been implying a pri-

vate cause of action under the virtually identical Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d. *Cannon*, _____ U.S. at _____, 99 S.Ct. at 1956-61.

With respect to the CEA, courts have observed that in 1974 and 1978 when the CEA was amended, Congress was aware that the courts had implied a private cause of action under the CEA. *E.g.*, *Smith v. Groover*, 468 F. Supp. at 113, (*citing* Remarks of Rep. Poage, 119 Cong. Rec. 41333 (1973); Hearings on H.R. 11955 Before the House Committee on Agriculture, 93rd Cong., 2d Sess. 249, 321, Hearings on S. 2485, S. 2578, S. 2837 and H. R. 12113 Before the Senate Committee on Agriculture and Forestry, 93d Cong., 2d Sess. pt. 3, at 737, 746 (1974)); *Hofmayer* 459 W. Supp. at 738. Those references to legislative history do not clearly and unambiguously recognize private causes of action under the CEA — *let alone under 7 U.S.C. § 13(b)*. The citations to legislative history in plaintiff's supplemental brief are equally inconclusive with respect to the Congressional recognition of a private cause of action under 7 U.S.C. § 13(b). Indeed, one Senator who spoke favorably of implied causes of action under the CEA, noted that the courts are split over the issue. Remarks of Senator Huddleston, 124 Cong. Rec. S. 10537 (July 12, 1978). In any event other factors dilute the significance of plaintiffs' references to legislative history. First, Congress has rejected three bills which, if enacted, would have created an express private cause of action: H.R. 11195, 93d Cong., 1st Sess. § 17(3) (1973); S. 2387, 93d Cong., 1st Sess., 1st Sess. § 505 (1973); S. 2578, 93d Cong., 1st Sess. § 20(3) (1973). *National Super Spuds*, 470 F. Supp. at 1260.

Those bills contained provisions permitting recovery of treble damages, and plaintiffs thus conclude that Congress simply refused to expand the existing implied cause of action, *citing Smith v. Groover*, 466 F. Supp. at 113. Plaintiffs' argument fails to recognize, however, that at least one of the bills, S. 2837, distinguished between actual damages for non-wilful violations and treble damages for wilful violations. *National Super Spuds*, 470 F. Supp. at 1260 n. 25. In addition, the Court notes that a recent listing of the remedies available under the CEA, noticeably omitted any mention of a private cause of action. *Berman*, 467 F. Supp. at 322, *citing* Sen. Rep. No. 95-850, *supra*, 1978 *U.S. Code Cong. & Ad. News* at pp. 2100-01.

A second indicator of legislative intent discussed in the Supreme Court cases is the presence or absence of other remedies. In *Cort*, the Supreme Court found no implied private cause of action, but expressly rejected an argument of the defendants to the effect that the presence of other express private remedies in later enacted statutes which were related to the one under consideration impliedly negated the existence of any implied private cause of action in the statute under consideration. 422 U.S. at 82-83 n. 14. The Court reasoned that the defendants' reliance on *National R.R. Pass. Corp. v. National Assn. of R.R. Pass. (Amtrak)*, 414 U.S. 453 (1974); and *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959), was misplaced because in those cases there was support in the legislative history for the proposition that the express remedies were exclusive. *Cort*, 422 U.S. at 83 n. 14, *citing Amtrak*, 414 U.S. at 458-61; *T.I.M.E.*, 359 U.S. at 471-72, 477, & n. 18. Moreover, Justice Brennan reasoned in *Cort* that

"it would be odd to infer from Congress' actions concerning the newly created provisions . . . any intention regarding the enforcement of a long-existing statute." 422 U.S. at 83 n. 14.

More recent cases may have at least implicitly eroded the significance of contemporaneous enactment in determining whether the existence of one remedy implies the non-existence of all others. The Court in *Touche Ross*, construing Securities Exchange Act § 17(a), 15 U.S.C. § 78q(a), noted the express creation of a private cause of action in Securities Exchange Act § 18(a), 15 U.S.C. § 78r(a), to remedy injuries similar to those complained of by the plaintiff under section 17(a), and concluded that "[W]here the principal express civil remedy for misstatements in reports created by Congress *contemporaneously* with the passage of § 17(a) is by its terms limited to purchasers and sellers of securities, we are extremely reluctant to imply a cause of action in § 17(a) that is significantly broader than the remedy that Congress chose to provide." *Touche Ross*, _____ U.S. at _____, 99 S.Ct. at 2489 (emphasis added). The Court cited several cases, including *Amtrak* and *T.I.M.E.*, but failed to mention its discussion in footnote 14 of *Cort*. Moreover, it is arguable that the controlling factor was the express limitation in section 18(a) to purchasers and sellers rather than the contemporaneous enactment of sections 17(a) and 18(a).

Transamerica, however, provides more solid support for analyzing together two statutes which are not enacted contemporaneously. The statute under consideration was section 206 of the Investment Advisers Act

of 1940, 15 U.S.C. § 80b-6. Justice Stewart reasoned:

> [I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Mills v. United States*, 278 U.S. 282, 289 (1929). See *Amtrak*, *supra*, 414 U.S., at 458; *Securities Protection Investment Corp. v. Barbour*, 421 U.S. 412, 419; *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 471. Congress expressly provided both judicial and administrative means for enforcing compliance with § 206. First, under § 217 willful violations of the Act are criminal offenses, punishable by fine or imprisonment, or both. Second, § 209 authorizes the Commission to bring civil actions in federal courts to enjoin compliance with the Act, including, of course, § 203 to impose various administrative sanctions on persons who violate the Act, including § 206. In view of these express provisions for enforcing the duties imposed by § 206, it is highly improbable that "Congress absentmindedly forgot to mention an intended private action." *Cannon v. University of Chicago*, _____ U.S., at _____ (Powell, J., dissenting).

Even settled rules of statutory construction could yield, of course, to persuasive evidence of a contrary legislative intent. *Securities Protection Investor Corp. v. Barbour*, 421 U.S. 412, 419; *Amtrak, supra*, 414 U.S., at 458. But what evidence of intent exists in this case, circumstantial though it be, weighs

against the implication of a private right of action for a monetary award in a case such as this. Under each of the securities laws that preceded the Act here in question, and under the Investment Company Act which was enacted as companion legislation, Congress expressly authorized private suits for damages in prescribed circumstances.[10] For example, Congress provided an express damage remedy for misrepresentations contained in any underwriter's registration statement in § 11(a) of the Securities Act of 1933, and for certain materially misleading statements in § 18(a) of the Securities Exchange Act of 1934. "Obviously, then when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly." *Touche Ross & Co. v. Redington*, _____ U.S., at _____. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S., at 734; see *Amtrak, supra*, 414 U.S., at 458; *T.I.M.E., Inc. v. United States, supra*, at 471. The fact that it enacted no analogous provisions in the legislation here at issue strongly suggests that Congress was simply unwilling to impose any potential monetary liability to a private suitor. *See Abrahamson v. Fleschner*, 568 F.2d 862, 883 (Gurfein, J., dissenting).

Transamerica, _____ U.S. at _____, 100 S.Ct. at 247-48. Later in the opinion the Court noted:

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[10] See Securities Act of 1933, §§ 11 and 12, 15 U.S.C. §§77k and 771; Securities Exchange Act of 1934, §§9(e), 16(b), and 18, 15 U.S.C. §§71i(e), 78p(b), and 78r; Public Utility Holding Company Act of 1935, §§15(a) and 17(b), 15 U.S.C. §§79p(a) and 79q(b); Trust Indenture Act of 1939, §323(a), 15 U.S.C. §77www(a); Investment company Act of 1940, §30(f), 15 U.S.C. §80a-29(f).

> Congress amended the Investment Company Act in 1970 to create a narrowly circumscribed right of action for damages against investment advisers to registered investment companies. Act of Dec. 14, 1970 Pub. L. 91-547, § 20, 84 Stat. 1428, 15 U.S.C. § 80a-35(b). While subsequent legislation can disclose little or nothing of the intent of Congress in enacting earlier laws, *see SEC v. Capital Gains Research Bureau*, 375 U.S., at 199-200, the 1970 amendments to the companion Act is another clear indication that Congress knew how to confer a private right of action when it wished to do so.

Id. at 248 n. 13. Apparently then, contemporaneous enactment is not important, at least where there are express remedies in other, related laws.

In the instant case, the Court believes that the creation of a broad enforcement scheme in 1974 (*see* pp. 3-4 *supra*) is an implied rejection of a private cause of action under 7 U.S.C. § 13(b). Any weakness in this conclusion generated by the noncontemporaneous enactment of section 13(b) and the 1974 amendments is cured by the fact that the amendments affected the CEA of which section 13(b) is a part (*see* discussion of *Transamerica, supra*, p. 14); the amendments even made minor alterations in section 13(b).[6] Even more significantly, 7 U.S.C. § 9 was enacted contemporaneously with 7 U.S.C. § 13 in 1922 and 7 U.S.C. § 9

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[6] The 1974 amendment substituted a $100,000 fine for the existing $10,000 fine. Pub. L. 93-463, Title II, § 212(d)(2), 88 Stat. 1404 (1974). The 1978 amendment increased the maximum penalty to $500,000, although maintaining it at $100,000 for individuals. Pub. L. 95-405 §19(2), 92 Stat. 875 (1978).

does apply to price manipulation. This limited remedy in 7 U.S.C. § 9 should be deemed to exclude a private remedy for price manipulation.

In *Borak*, it should be recalled, the Court implied a private cause of action from a broad jurisdictional statute. 377 U.S. at 430-31; *see* p. 6, *supra*. Plaintiffs here also rely on a jurisdictional statute. In *Touche Ross* the Court expressly repudiated *Borak's* reliance on a jurisdictional statute, reasoning that the jurisdictional statute "creates no cause of action of its own force and effect; it imposes no liabilities. The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the Act which they seek to enforce, not in the jurisdictional provision." _____ U.S. at _____, 99 S.Ct. at 2490. *See also* the discussion of jurisdiction and implied causes of action, *supra* p. 5. The jurisdictional statute involved here, 7 U.S.C. § 2, provides in pertinent part:

> [T]he Commission shall have exclusive jurisdiction with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 7 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title: *And provided further*, That, except as hereinabove provided, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time con-

ferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission or other regulatory authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State.

Courts have held that the addition of the last quoted sentence in 1974 refutes any indication that Congress did not intend an implied cause of action and that the first quoted sentence only refers to *exclusive administrative* jurisdiction. *E.g.*, *Smith v. Groover*, 468 F. Supp. at 114; *Hofmayer*, 459 F. Supp. at 737. Even assuming that this view is correct (which seems improbable in view of the discussion on p. 5 *supra*) this Court believes the amendment to 7 U.S.C. § 2 insufficient to overcome the other factors discussed herein.

3. *Purpose of legislative scheme*

The Supreme Court has not, since *Cort*, significantly furthered the understanding of this factor; two recent cases fail to give it any independent significance. *Transamerica*, _____ U.S. at _____, 100 S.Ct. at 249; *Touche Ross*, _____ U.S. at _____, 99 S.Ct. at 2489.

One factor cited by some courts in support of implying a private cause of action under the CEA is the view of the CFTC that the courts should do so. *Berenson*, 2 Comm. Fut. L. Rep. at p. 22978; *Hofmayer*, 459 F. Supp. at 738. While agencies entrusted with the en-

forcement of statutes are entitled to deference in the construction of those statutes, the courts are peculiarly able to answer such a question as is presented here. *Piper*, 430 U.S. at 41 n. 27.

In addition, plaintiffs maintain that Urner Barry is not subject to the administrative jurisdiction of the CFTC because Urner Barry is not involved in commodities futures trading and that as a result the implication of a private cause of action would be consistent with the commodities legislative scheme. Plaintiffs in this action, however, urge that the prohibition against price manipulation in 7 U.S.C. § 13(b) applies to Urner Barry. The CFTC may control price manipulation. 7 U.S.C. §§ 9, 13a-1, 18.[7] *See* p. 4 *supra*.

4. *State law*

The defendant Urner Barry has conceded that in this case the fourth factor has no relevance (defendant's brief of October 30 at p.8 n.3).

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[7] Section 18 applies to Urner Barry because it is required to be and is registered with the CFTC under 7 U.S.C. §6m. It is required to be and is registered because it is a "commodity trading advisor," defined in 7 U.S.C. ¶ 2 as:

> any person who, for compensation or profit, engages in the business of advising others, either directly or through publications or writings as to the value of commodities . . . or who for compensation or profit, and as part of a regular business issues or promulgates analyses or reports concerning commodities. . . .

The plaintiffs complain, without supporting authority, that Urner Barry did not register until November 9, 1979 — after filing the instant motion to dismiss.

III. Primary jurisdiction

Defendant also urges dismissal of all counts (see note 1 *supra*) under the doctrine of primary jurisdiction, relying upon *Chicago Mercantile Exch. v. Deaktor*, 414 U.S. 113 (1973), and *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289 (1973). Defendant contends that the complexity of this case and the need for uniform treatment of the entire egg industry dictate this result. For the reasons stated below the Court will DEFER RULING on this aspect of the motion. First, the Court does not possess a clear enough understanding of the nature of the dispute between the parties, and the understanding which the Court does have is based on an unrecorded oral argument and not a factual record. The Court comprehends generally that Urner Barry believes this dispute to be a complex one, requiring the sort of technical and consistent guidance which a single agency can provide better than many different trial courts; plaintiffs, on the other hand, consider this dispute to be much like a typical fraud case. Although the Court presently views the dispute as one involving issues more technical than and requiring more uniform treatment than a typical fraud case, the Court will not rule upon this aspect of the motion absent a record which demonstrates that this is or is not a case requiring administrative expertise and uniformity.

Second, the Court notes the rather peculiar manner in which Urner Barry has stated its alternative grounds for this motion. In brief and in oral argument, it has emphasized the implied cause of action issue which concerns only Count I over the primary jurisdiction issue which concerns plaintiffs' whole case.

The Court is not sure Urner Barry will still want to dismiss or stay the rest of the case, given the Court's ruling on the implied cause of action issue. Indeed, the Court can readily understand that even the plaintiffs might, if permissible, want to take Counts II and III to the CFTC should they pursue a remedy there under 7 U.S.C. § 13(b).

Accordingly the Court will DEFER RULING on the motion to dismiss Counts II and III.

Urner Barry's Motion to Compel

In its motion to compel, defendant states that its counsel have met with counsel for plaintiffs in an attempt to resolve discovery disputes. Related disputes have been settled, but three separate disputes have been submitted to the Court.

A. *Interrogatory Number Nine*

The first dispute involves defendant's interrogatory number nine which asks:

> Identify all persons that have contributed, are contributing, have promised to contribute, are expected to contribute, or have been asked or have volunteered to contribute to the payment of the expenses of prosecuting this action by plaintiffs, and for each such person, state the full details concerning said persons' actual or prospective contribution and identify all data relating thereto.

In objection plaintiffs state:

> This interrogatory requests information that is

neither relevant nor likely to lead to the discovery of admissible evidence.

In a supplemental response plaintiffs further state:

> Clarendon[8] continues to object to this interrogatory for the reasons set forth in its first response to these Interrogatories. To the extent that Defendant contends that this interrogatory seeks information relevant to Defendant's counterclaim, Clarendon objects to such discovery because the counterclaim cannot be maintained for the reasons set forth in the Counterclaim Defendants' Motion for Partial Summary Judgment. Clarendon further objects to this interrogatory on the grounds that to provide Urner Barry with this information would violate Plaintiffs' First Amendment right of association and would have a chilling effect on this lawsuit due to Urner Barry's complete dominance over the market for egg price quotation services and because of Urner Barry's ability to determine, in a wholly unfettered fashion, who it will contact in the course of its egg market canvass.

Urner Barry argues that interrogatory number nine seeks discovery relevant in several ways: (1) the contributors to the litigation fund may be co-conspirators, (2) the contributors to the litigation fund may have discoverable knowledge of plaintiffs' alleged price-fixing and their motivation in filing this action, (3) one or more of the contributors may be a real party in interest, and (4) the contributors may be in privity

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[8] Clarendon is one of the plaintiffs; all of the plaintiffs except Kimsey responded in a like manner.

with present plaintiffs, thereby affecting the res judicata effects of any decree entered in this action. The plaintiffs contest each argument made by defendant. Because the Court agrees with the first argument, it need not treat the others. Plaintiffs also urge the Court to delay ruling until after it rules on plaintiffs' motion for partial summary judgment. In that motion plaintiffs seek dismissal of certain allegations by defendant on the grounds that they run afoul of the "*Noerr - Pennington*" doctrine established in *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127 (1961) and *UMW v. Pennington*, 381 U.S. 657 (1965). Because the Court can rule on the motion to compel without regard to the merits of that motion, it need not delay ruling.

In support of its motion defendant cites *Uinta Oil Refining Co. v. Continental Oil Co.*, 226 F. Supp. 495, 500 (D. Utah 1964), where another district court stated:

> Interrogatory 130 asks for the name of persons sharing in the costs of the litigation. The plaintiffs' assertion that the disclosure of this information will enable defendants to intimidate or penalize plaintiffs' supporters is not sufficient to preclude an otherwise proper inquiry. Especially in the sensitive atmosphere of pending antitrust litigation intimidations are not to be lightly presumed, and adequately can be dealt with otherwise should the necessity arise. The requested information may have some bearing upon motives, credibility, damages and relevant relationships within the industry.

This Court need not even go as far as *Uinta* in find-

ing that the interrogatories seek "information [which] appears reasonably calculated to lead to the discovery of admissible evidence," (Fed. R. Civ. P. 26(b)(1)), because the discovery here is calculated to ascertain the identity of persons who might be joined as defendants to Urner Barry's counterclaim. Plaintiffs contend, however, that allowing such discovery will enable Urner Barry to retaliate against those persons whose identity it discovers, thereby chilling the First Amendment rights of plaintiffs and their financial supporters. In reply, Urner Barry argues that it cannot effectively retaliate even if it so desires. The Court believes that plaintiffs have not demonstrated that Urner Barry can effectively retaliate against plaintiffs and their financial supporters without simultaneously harming its other customers and ruining its integrity. Significantly, plaintiffs do not even contend that defendant has taken any steps to retaliate against those persons whose identity it already knows. Accordingly, the Court concludes that the remote chance of retaliation is not a reason to deny the discovery request, and ORDERS that the discovery be granted.

B. *Interrogatory Number Eleven*

Interrogatory number eleven requests:

> For each trade association or group identified in your answer to the preceding interrogatory, identify all members thereof and identify all documents relating thereto concerning each Plaintiff's participation or membership therein.

The "preceding interrogatory" referred to interrogatory number ten which requested that plaintiffs iden-

tify each trade association in which they are involved. Originally plaintiffs objected to number eleven on the same grounds as number nine; they have supplemented their response as follows:

> Clarendon does not know the identity of all members of the entities referenced in its answer to the prior interrogatory. Clarendon does know that the only direct members of United Egg Producers are National Egg Company, Northeastern Egg Marketing Association, Midwest Egg Producers, Northwest Egg Producers West Egg Company, and Southern California Egg Cooperative. Clarendon continues to object to this interrogatory to the extent that it requests Clarendon to identify documents for the reasons set forth in Clarendon's original objection to this interrogatory.

Trade association activities are of paramount concern in cases involving allegations of a conspiracy to fix prices, and as such are discoverable. Accordingly, the Court ORDERS that interrogatory number eleven be answered.

C. *Request for Production Number Two*

Urner Barry's request for production number two asks for "[a]ll Federal and State income tax returns filed by each plaintiff during each year beginning with 1973 to the present." In response plaintiffs referred to their objection to interrogatory number nine. *See* p. 19 *supra*. Urner Barry contends that tax returns are relevant to, among other issues, any damages plaintiffs might seek. Plaintiffs deny the relevancy of the tax returns. In *Keco Industries, Inc., v. Stearns*

Electric Corp., 285 F. Supp. 912, 913 (E.D. Wis. 1968), the district court observed, "Plaintiff . . . maintains simply that 'too many factors and considerations are present in a year of business and production for the total income as reported for tax considerations to be pertinent to any particular matter.' To some extent this is true." The court nevertheless concluded: "But this court still believes that the tax returns may shed some light on the damage issue, that they may at least 'lead to the discovery of admissible evidence. . . .' " The *Keco* court did not indicate *how* it would lead to discovery of admissible evidence, and defendant has made no such showing here either with respect to proof of loss of profits, domicile, or real parties in interest. Any of those matters can be discovered in numerous other ways.

Further, plaintiffs correctly urge the Court to recognize that the case law establishes a public policy against disclosure of tax returns. *E.g. Carlson Companies, Inc. v. Speery & Hutchinson Co.*, 374 F. Supp. 1080, 1084-85 (D. Minn. 1974), *rev'd on other grounds*, 507 F.2d 959 (8th Cir. 1979); *Richland Wholesale Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 40 F.R.D. 480, 482-83 (D. S.C. 1966); *Cooper v. Hallgarten & Co.*, 34 F.R.D. 482, 483 (S.D.N.Y. 1964). (Two of the cases cited by plaintiffs recognize the need for discovery of tax returns of one claiming damages. *Carlson*, 374 F. Supp. at 1080; *Richland*, 40 F.R.D. at 482.) The Court concludes that the relevance of tax returns is minimal at best and that, moreover, the policy against disclosure of tax returns forbids their discovery absent a showing of particular need. No such showing has been made here; thus the Court

ORDERS that the Request for Production No. 2 need not be complied with.

Although defendant has urged the Court to award it attorney fees and costs for bringing this motion, and although such an award is sometimes permissible, Fed. R. Civ. P. 37(a)(4), the Court DENIES the request here because it finds the opposition "substantially justified," Fed. R. Civ. P. 37(a)(4).

Plaintiffs' Motion For Summary Judgment

The plaintiffs' motion for summary judgment presents two independent questions of antitrust law. First, plaintiffs contend that they are entitled to summary judgment on defendant's damage claims for price-fixing on the grounds that defendant is not a "direct purchaser" from plaintiffs, relying upon *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Second, plaintiffs argue that they are entitled to summary judgment to the extent that defendant has alleged that they have violated the antitrust laws by bringing a lawsuit. For this proposition the plaintiffs rely on the "*Noerr-Pennington* doctrine" which derives from *Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *UMW v. Pennington*, 381 U.S. 657 (1965). Urner Barry and plaintiffs have responded to the Court's order of September 18, 1979, that Urner Barry show cause why the Court should not presently rule on plaintiffs' motion for summary judgment.

A. *Noerr-Pennington*

As to the *Noerr-Pennington* defense, Urner Barry

has argued that the motion is really one to dismiss because plaintiffs have "not relied upon any depositions, answers to interrogatories, admissions, or affidavits to show that there is no genuine issue as to any material fact." In their statement of material facts, plaintiffs indeed do rely on such evidence. Whether that evidence creates a genuine dispute as to a material fact is, of course, a different question—indeed, it is precisely the question presented by the motion for summary judgment. Alternatively, defendant Urner Barry contends that the motion should not be ruled upon until it obtains the discovery which was the subject of the motion to compel discussed above. Plaintiffs' main argument to the contrary is that defendant has failed to actively pursue discovery. In that regard the Court observes that plaintiffs consented on August 21, 1979, to an extension of discovery through February 20, 1980 and that the Court by Order of February 25, 1980 granted a further extension over the opposition of plaintiffs. The Court was informed at oral argument on January 8, 1980 that discovery has been delayed during the time the Court has had these motions under advisement. Because defendant's motion to compel has been granted, because plaintiffs have agreed to an extension of discovery, and because discovery has been further extended, the Court will DEFER RULING on the *Noerr-Pennington* aspect of the motion for summary judgment until after the termination of discovery. *See* Fed. R. Civ. P. 56(f). Further, it appears that the *Noerr-Pennington* aspect of the motion would affect only a small portion of the defendant's counterclaim — *i.e.* the allegations that plaintiffs' filing of the lawsuit is illegal. Moreover, defendant has argued, apparently without opposition, that the filing of the lawsuit may be used as evidence even if it is exempt as

an independent basis for antitrust liability. *See e.g., UMW v. Pennington*, 381 U.S. 657, 670 n. 3; *Feminist Women's Health Center, Inc. v. Mohamad*, 586 F.2d 530, 543 n. 7 (5th Cir. 1978); *United States v. Southern Mtr. Carriers Rate Conf.*, 439 F. Supp. 29, 47 (N.D. Ga. 1977). Finally, these issues would become moot, if plaintiffs were to move successfully for complete summary judgment at the close of discovery.

B. *Illinois Brick*

As to the *Illinois Brick* defense, the parties agree that the motion is ripe for ruling. It is not disputed that defendant is not an indirect purchaser from plaintiffs. A careful reading of *Illinois Brick* reveals that the case has no application to the instant case. In *Illinois Brick* the Supreme Court held that indirect purchasers could not sue manufacturers for damages from price-fixing. The rationale of *Illinois Brick* turned on the Supreme Court's previous decision in *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), that an antitrust defendant could not reduce his liability by showing that direct-purchaser plaintiffs had "passed-on" their injury to indirect purchasers. The Court reasoned that to permit litigation over the "pass-on" concept would create a risk of multiple liability, *Illinois Brick*, 431 U.S. at 730, and overly complicate proof of damages.[9] *Id.* at 73-33; *Hanover Shoe*, 392 U.S. at 492-93.

This brief discussion of *Illinois Brick* and its reliance on *Hanover Shoe* indicates that *Illinois Brick* has no

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[9] *Illinois Brick* expressly did not deal with "standing." 431 U.S. at 728 n.1.

significance other than for "indirect purchasers." To hold, as plaintiffs request, that "[o]nly direct purchasers . . . have standing" would deprive anyone outside a chain of distribution of the right to sue for antitrust damages for price-fixing. Judge Wisdom has described *Illinois Brick* in a manner entirely inconsistent with such an argument:

> The *Illinois Brick* decision rested on avoidance of overlapping liability and on concern about the complexities and uncertainties of proof that would attend general recognition of passing-on theories of damage. What is critical is not whether a defendant competes in the relevant industry but whether the plaintiff's action (or the defendant's defense) asserts a form of passing-on theory.

431 U.S. at 728, p. 7. *In re Beef Industry Antitrust Litigation*, 600 F. 2d 1148, 1160 (5th Cir. 1979). For the foregoing reasons the Court DENIES the motion insofar as it relies upon *Illinois Brick*.

The Court requested by telephone that the parties argue the application to this case of traditional standing principles. Plaintiffs submitted a brief and both parties argued the point at oral argument. The Court hereby ORDERS defendant to respond to that brief in writing within fifteen (15) days. Plaintiffs may reply within fifteen (15) days thereafter.

SUMMARY

Following is a summary of the actions taken by the Court herein: (1) the Court GRANTS defendant's motion to dismiss only as to Count I and DEFERS

RULING on the motion to dismiss as to Counts II and III; (2) the Court GRANTS defendant's motion to compel as to interrogatories numbers nine and eleven and DENIES the motion as to request for production number two; and (3) the Court DEFERS RULING on plaintiffs' motion for summary judgment with respect to the *Noerr-Pennington* issue, DENIES the motion with respect to the *Illinois Brick* issue, and DEFERS RULING with respect to the standing issue.

SO ORDERED, this 27th day of March, 1980.

CHARLES A. MOYE, JR.
United States District Judge

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

SUNNYSIDE EGGS, INC., *et al.*,	:	CIVIL ACTION
Plaintiffs,	:	FILE NO. C78-1661A
v.	:	
URNER BARRY PUBLICATIONS, INC.	:	
Defendant.	:	

ORDER

Presently pending in this case are several matters. First, pursuant to this Court's order of February 26, 1980, the parties filed on May 22, 1980, a joint statement setting forth their positions on the Court's order of January 31, 1980, in which defendant Urner Barry Publications, Inc. was directed to compensate plaintiffs for the reasonable costs of (1) their opposition to defendant's motion for protective order of January 28, 1980, and (2) the rescheduling of certain depositions. Second, the Court has before it plaintiffs' motion for reconsideration of the Court's order of March 27, 1980, in which the Court granted defendant's motion to dismiss as to the cause of action allegedly arising under the Commodity Exchange Act. In addition, the Court continues to be confronted with those issues on which it deferred ruling in its March 27, 1980 order, namely (1) defendant's motion to dismiss as to Counts II and III of plaintiffs' complaint; (2) plaintiffs' motion for summary judgment with respect to the *Noerr-Pen-*

nington issue; and (3) plaintiffs' motion for summary judgment with respect to the standing issue.

Considering first the matter of attorneys' fees and costs arising out of defendant's motion for protective order, the Court notes that plaintiffs' initial request was for $700.75 and their amended request in a letter to defendant's counsel was for $706.55. The initial amount included $683.50 for attorneys' fees and $17.25 for costs, while the amended request was higher because an additional telephone call in the amount of $5.80 was added. The defendant opposed this amount as excessive and in its order of February 26, 1980, the Court ordered the parties to submit a single joint document to the Court outlining their positions if they could not agree on an amount. Finding themselves unable to agree, the parties submitted a joint statement under seal on May 22, 1980. Without breaching the confidences of the materials under seal, the Court will consider the matters filed in that document.

On January 28, 1980, defendant filed a motion for protective order postponing the taking of two depositions which had been noticed by plaintiffs. The defendant wished the depositions postponed until the defendant's motion to dismiss and the plaintiffs' motion for summary judgment could be ruled upon by the Court. The defendant filed a three page brief in support of its motion, citing four cases therein, to which plaintiffs responded one day later with a five page brief in which no cases were cited as authority. While the Court agreed that the motion of defendant should be granted, because the motion was filed less than ten days prior to the scheduled depositions, preventing plaintiffs from utilizing their full ten days to respond,

the Court ordered costs and attorneys' fees to be assessed against defendant.

Plaintiffs' counsel, in a letter to defendant's counsel dated March 4, 1980, and filed as Exhibit A to the joint statement referred to above, stated that review of defendant's motion and the preparation of a response thereto required the work of four attorneys for 9.6 hours and of one paralegal for 2 hours, for a total of $683.50 in fees. Plaintiffs argue that this amount of time was reasonable because it was necessary for each attorney to review all pleadings in the matter and to spend some time in conference discussing responses to pleadings and in reviewing drafts of those pleadings.

Defendant argues that the twelve factors of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), which establish guidance for setting attorneys fees in employment discrimination cases are applicable or at least of assistance here. While the plaintiffs cited three cases which they claimed held *Georgia Highway Express* to be inapplicable to this dispute, the Court does not read those cases as prohibiting it from considering the *Georgia Highway Express* factors in setting a reasonable fee here. Those factors are:

> (1) The time and labor required; (2) The novelty and difficulty of the questions; (3) The skill requisite to perform the legal service properly; (4) The preclusion of other employment by the attorney due to acceptance of the case; (5) The customary fee; (6) Whether the fee is fixed or contingent; (7) Time limitations imposed by the client or other circumstances; (8) The amount involved and the results

obtained; (9) The experience, reputation, and ability of the attorneys; (10) The "undesirability" of the case; (11) The nature and length of the professional relationship with the client; (12) Awards in similar cases.

488 F.2d at 717-19.

The Court believes that 9.6 hours of work by four attorneys and two hours of work by one paralegal is excessive to review a three page brief and file a five page response to a motion for protective order. The question presented was not difficult or novel. While the response did have to be hurriedly compiled, the time limitation involved would not require the work of four attorneys, one of whom by the plaintiffs' own admission merely reviewed final drafts and insured proper and timely filing of the response.

The Court finds that the fee charged by the attorney who was the principal individual involved with this matter on behalf of plaintiffs according to the letter he wrote to defendant's counsel on March 4, 1980, is the only reasonable attorney's fee which should be assessed against defendant. Therefore, the Court hereby DIRECTS defendant to pay plaintiffs $366.00 in attorney's fees and $23.05 in costs, for a total of $389.05 This amount is lower than the $706.55 requested by plaintiffs and higher than the $240.00 offered by defendant; the Court feels it is a reasonable amount for the services rendered.

The Court next considers plaintiffs' motion for reconsideration of this Court's order of March 27, 1980, in which the Court refused to find an implied private

cause of action under a criminal provision of the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.* As the Court recently noted in *Westlake v. Abrams*, ____ F. Supp. ____ (N.D. Ga. 1980) (No. C78-555A, filed December 1, 1980), the question of whether an implied private cause of action arises under the Commodity Exchange Act should soon be answered by the Fifth Circuit Court of Appeals in the case of *Rivers v. Rosenthal & Co.*, Civ. Action File No. CV178-186 (S.D. Ga. 1978), appeal pending, 79-1313 (5th Cir.). The case was heard on oral argument June 4, 1980, by Judges Kravitch, Reavley, and Henderson. Since the forthcoming decision in *Rivers* may lend guidance to this Court in interpreting plaintiffs' claims under 7 U.S.C. § 13(b), the Court will today DEFER RULING on plaintiffs' motion for reconsideration until such time as *Rivers* is decided.

Remaining before the Court is the defendant's motion to dismis as to Counts II and III of plaintiffs complaint and plaintiffs' motion for summary judgment with respect to the *Noerr-Pennington* issue and the standing issue. The Court deferred ruling on these matters in its March 27, 1980 order, and in light of ongoing settlement negotiations will continue to DEFER RULING on those motions until after the close of discovery. Upon the joint application of counsel for nine plaintiffs and counsel for defendant discovery was again extended on November 20, 1980, through and including January 27, 1981.

SO ORDERED, this 8 day of December, 1980.

CHARLES A. MOYE, JR.
United States District Judge

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

SUNNYSIDE EGGS, INC., *et al.*,	:	CIVIL ACTION
Plaintiffs,	:	FILE NO. C78-1661A
vs.	:	
URNER BARRY PUBLICATIONS, INC.	:	
Defendant.	:	

ORDER

Presently before the Court in this matter are two issues due the Court's consideration. First, the Court must consider objections by the National Egg Company (NECO) to a subpoena duces tecum dated November 7, 1980, served by defendant Urner Barry Publications, Inc.[1] Second, the Court must decide whether to continue to defer ruling on plaintiffs' motion for reconsideration of this Court's order of March 27, 1980, in which the Court refused to find an implied cause of action to exist under the Commodity Exchange Act.

The subpoena of which NECO complains seeks numerous documents held by National Egg Company, some of which are over twenty years old. NECO has stated both general and specific objections to the subpoena. The general objections are aimed at each

[1] Because the subpoena has not been filed, it is attached hereto as an appendix.

paragraph of the subpoena while the specific objections all complain that (1) specific portions of the subpoena seek information that is neither relevant nor calculated to lead to the discovery of admissible evidence; (2) the particular request is overly broad, and (3) the request is burdensome and oppressive.

NECO has agreed to produce the documents sought in paragraphs 2, 4, 5, 6, 8, 11, 12 and 14 subject to its general objections to producing (1) any documents protected by the attorney-client privilege of work product immunity; (2) confidential or commercially sensitive documents, provided, however, that NECO will not assert such obligation upon wirtten assurances from counsel for the parties that the confidentiality of NECO's documents will be maintained; (3) documents for time periods which are not the subject of this litigation. As to paragraphs 1. 3, 7, 9, 10, and 13, NECO asserts the above general objections as well as the specific ones outlined above.

Having examined the subpoena, the Court agrees that it is possible the documents requested in paragraphs 1, 3, 7, 9, 10, and 13 seek numerous documents some of which may not be relevant nor calculated to lead to the discovery of admissible evidence. Those paragraphs seek all minutes, summaries, reports, recordings, transcripts and other records of any meeting of NECO, of its diretcors, or of any committee of NECO from January 1, 1970 to present; all newsletters, magazines and reports from NECO to its members from January 1, 1960, to present; documents showing all members of NECO from January 1, 1977 to present; numerous documents relating to NECO's involvement with egg price control; all correspondence

between NECO and 17 other corporations and agencies over the past six years; and documents showing all rules, bylaws, regulations, and policies governing NECO from the date of its formulation to present. The production of all these documents may be extremely costly and it is possible that much of the expenditure would be wasted on irrelevant material. Consequently, the Court will GRANT NECO's motion to quash the subpoena as to paragraphs 1, 3, 7, 9, 10 and 13, but will allow Urner Barry Publications, Inc. to issue another subpoena seeking all or portions of these documents if it files the subpoena with the Clerk within twenty days of this order and in connection therewith files a memorandum of law stating with specificity the materiality and relevancy to this action of each document sought. NECO has offered to deliver to Urner Barry the documents sought by paragraphs 2, 4, 5, 6, 8, 11, 12 and 14 of the subpoena subject to its general objections and has requested an advancement for costs of $500.00. The Court orders NECO to provide a schedule of anticipated costs which it believes the production of these documents will cause it to incur. Upon receipt thereof, the Court will consider the motion for advancement of costs as well as the motion to quash the production of those documents for which a general objection has been raised.

The Court now turns to plaintiffs' request that the Court continue to defer ruling on plaintiffs' motion for reconsideration of this Court's order of March 27, 1980. The basis of the plaintiffs' request is that although the Fifth Circuit has recently found the absence of any implied cause of action under 7 U.S.C. §§ 6b, 6k (the Commodity Exchange Act) in *Rivers v. Rosenthal & Co.*, 634 F.2d 774 (5th Cir. 1980), the

United States Supreme Court has granted certiorari in the case of *New York Mercantile Exchange v. Leist*, 49 U.S.L.W. 3617 (February 24, 1981), a case wherein the Second Circuit found an implied cause of action under 7 U.S.C. §§ 6b, 7(d), 7a(8) and 13(b). *See Leist v. Simplot*, _____ F.2d _____ (2d Cir. 1980). Because the case before this Court involves section 13(b), the plaintiff argues that the Court should not again deny a cause of action to exist thereunder following *Rivers*, but should await the Supreme Court's ruling in *Leist*.

Because discovery continues in this matter, as evidanced by the discussion involving a subpoena above, settlement negotiations continue, and *Leist* remains to be decided, the Court today will again DEFER RULING on the plaintiffs' motion for reconsideration of the Court's order of March 27, 1980, dismissing Count I of the complaint.

SO ORDERED, this 23rd day of March, 1981.

CHARLES A. MOYE, JR.
United States District Judge